

Dissenting Views to Accompany H. Res. 845  
Requesting Information on the Denial of Security  
Clearances to OPR Attorneys Investigating  
DOJ Approval of Warrantless Wiretaps

We dissent from the adverse reporting of H.Res. 845.

After 9/11, the Nation's highest lawyers authorized warrantless wiretapping on American soil, now unanimously condemned by constitutional scholars and intelligence professionals alike.

Repeatedly, the President and the Attorney General have refused to say which lawyers actually approved the program and through which process they did so. There are also reports that officials as high as then-Acting Attorney General James Comey refused to sanction the program due to constitutional and legal concerns.

Shortly after the *New York Times* first reported on the program, Representatives Hinchey, Lewis, Waxman and Woolsey, requested the Justice Department's Office of Professional Responsibility (OPR) conduct an investigation into who approved warrantless wiretapping on American soil and why.

The Office of Professional Responsibility "is responsible for investigating allegations of misconduct involving Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when they are related to allegations of attorney misconduct within the jurisdiction of OPR."<sup>1</sup> With the objective of "ensur[ing] that Department of Justice attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency."<sup>2</sup>

Pursuant to the Congresspersons' request, the OPR began an investigation into the Department of Justice's role in "authorizing, approving and auditing certain surveillance activities of the National Security Agency."<sup>3</sup>

Regretfully, OPR was unable to complete its task when either the NSA or the Justice Department – it is still unclear – denied its investigators access to the necessary information. On May 10, 2006, the Office of Professional Responsibility again wrote Congressman Hinchey stating, "We have been unable to make any meaningful progress in our investigation because OPR has been denied security clearances for access to information about the NSA program . . . without these clearances, we cannot investigate this matter and therefore have closed our

---

<sup>1</sup>Office of Professional Responsibility, <http://www.usdoj.gov/opr>.

<sup>2</sup>*Id.*

<sup>3</sup>Letter from H. Marshall Jarrett, Counsel, Office of Professional Responsibility, to Maurice D. Hinchey, et. al, regarding the termination of the investigation of warrantless wiretapping by the NSA (Feb. 2, 2006).

investigation.”

The denial of OPR access to any documents related to the Justice Department’s approval of NSA wiretapping is a move which, according to Michael Shaheen who headed the OPR from 1975 to 1997, simply did not occur for any reason in his time at the Office. He stated, “[my staff] never, ever was denied a clearance.”<sup>4</sup>

For decades, the determination of security clearance has turned on whether the applicant was “reliable, trustworthy, of good conduct and character and of unswerving loyalty to the United States.” Clearly, there is no evidence that OPR attorneys do not meet this standard. It appears that access may have been denied for purely political purposes. That is why H. Res. 845, which merely asks for documents relating to OPR’s denial is so important.

There are several levels of clearance, which have increasing standards of eligibility corresponding with increasing levels of sensitive information. The four main types of security clearance are confidential, secret, top secret, and sensitive compartmented information. It is also possible to be granted security clearance information related to one subject and denied certain information related to another subject, all within the same department or agency.<sup>5</sup>

Currently, it remains unclear whether the attorneys were denied the level of clearance required to investigate the DOJ’s participation in the NSA data-mining and wiretapping programs or whether the attorneys were granted security clearance and then denied access to this specific information.

Either way, it is difficult to understand why these attorneys have been denied access to the information necessary to effectively do their job. The Office of Professional Responsibility is the branch of the Department of Justice that is responsible for ensuring that its attorneys maintain the high ethical and professional standards set forth by the Nation’s primary law enforcement agency.<sup>6</sup> It is only natural to assume that attorneys entrusted to preserve the integrity of such an important government agency and given the authority to fully investigate allegations of misconduct<sup>7</sup> would be highly trustworthy, reliable and undoubtedly loyal to the United States government; and therefore worthy of this level of clearance.

Regardless of one’s position with respect to the NSA’s eavesdropping program, we cannot understand how anyone could support the Justice Department’s refusal to be investigated by a duly appointed and authorized office who is charged with monitoring the ethics of the Nation’s top lawyers. It is our firm belief that the Justice Department shouldn’t be permitted to arbitrarily pick and choose which ethics investigations it will decide to cooperate with.

---

<sup>4</sup>Shane Harris & Murray Waas, *Justice Department Probe Foiled*, NATIONAL JOURNAL May 27, 2006, at 53.

<sup>5</sup> Derrick Dortch, *Getting a Security Clearance*, WASH. POST, June 25, 2004.

<sup>6</sup> Office of Professional Responsibility, *available at* <http://www.usdoj.gov/opr/index.html>.

<sup>7</sup> *Id.*

John Conyers, Jr.  
Howard Berman  
Rick Boucher  
Jerrold Nadler  
Robert C. Scott  
Zoe Lofgren  
Sheila Jackson Lee  
Maxine Waters  
William D. Delahunt  
Robert Wexler  
Adam B. Schiff  
Chris Van Hollen